No. 17451

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 469, AFL-CIO, ET AL., RESPONDENTS

On Petition for Enforcement of an Order of The National Labor Relations Board

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BRIEF FOR THE RESPONDENTS

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AUTHORITIES CITED

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STATEMENT OF FACTS

I.

The strike against Thomas — stated generally.

Thomas was engaged as a general contractor in constructing a telephone building at Winslow, Arizona. (R. 4) He employed one carpenter and two or three laborers. These employees were represented respectivly by respondents Carpenters Local 1100 and Laborers Local 556 (R. 5; General Counsel's Exhibit No. 2, R. 105, 106).

Thomas had no plumbing employees. He subcontracted the plumbing work on the telephone building

to Howard Johnson, a non-union plumbing contractor from Phoenix, Arizona. (R. 5, 118)

Thomas commenced work on the building on September 8, 1959, (R. 46) and continued thereafter during all times material herein. Johnson's plumbing employees began work on October 12th (R. 5) when they installed two area drains on that day and on the next day, October 13th. (R. 136) They were next scheduled to return to the job site on the following Monday, October 19th. (R. 127)

On October 15th, when the plumbing employees were not on the job, respondents Carpenters Local 1100 and Laborers Local 556 directed, respectively, the one carpenter and three laborers not to return to work on Friday, October 16th. (R. 8, 10)

Because of the resulting work stoppage, Johnson immediately charged that the respondents had engaged in a secondary boycott, (R. 127) raising the issue whether respondents caused the employees of Thomas to strike with an object of forcing Thomas to cease doing business with Johnson.

II.

Particular facts of strike.

On Thursday, October 15th, Thomas' building superintendent, a man named Tacke, returned to the job site after having been absent about forty minutes. Waiting for him were four business agents: Wright, representing Laborers Local 556; Kropp, representing Carpenters Local 1100; Martin, a business agent of respondent Local 469; and a man named Logan who apparently was a representative from the Teamsters union. (R. 53, 54) A conversation then occurred be-

tween the business agents and Tacke lasting for about half an hour. (R. 56) During the course of this conversation, two items were mentioned or discussed: 1) the fact that the plumbing was being done by Howard Johnson; and, 2) that Thomas had in his employ a night watchman who was not receiving the wage scale called for in the laborers collective bargaining agreement.

Wright asked Tacke who had done his plumbing and Tacke said, "Howard Johnson." (R. 54) This was all that was said on this matter.

The night watchman matter was discussed in two respects: 1) whether he was a night watchman or a guard, and 2) whether, if he was a night watchman, he was being paid the union scale. Martin asked the name of the night watchman and how much he was getting paid. He said something about the night watchman not being paid enough and that he wasn't dispatched from the union hall. (R. 55) Wright inquired about the status of the night watchman, that is, whether he carried a pistol, had a deputy sheriff's badge. (R. 65) Tacke didn't know whether the night watchman was supposed to be union or not. (R. 71) Wright was figuring on the top of a box regarding the night watchman's pay, and concluded that the night watchman was getting less than $1.50 per hour, (R. 70) "a little bit below the union scale." (R. 65)

At some point in the conversation Wright said, "Well, I am going to have to pull our boys off. However, I will let you finish pouring your concrete." (R. 54)

Immediately thereafter, Kropp spoke with the carpenter employee (R. 83) and Wright talked to the la-

borers. (R. 85) None of these employees reported to work the following day.

ARGUMENT

I.

There was no substantial evidence that Respondents had as an object of the strike the forcing of Thomas to cease doing business with Johnson.

Prior to October 15th, on numerous occasions, various business agents from various construction unions in varying combinations, visited the job site. (R. 47) Martin, from the plumbers union, was present at most but not all of these visits. (R. 52) When Tacke advised in September that Johnson was to do the plumbing, Martin is reported to have said that "he won't do." (R. 50) These prior remarks, coupled with the fact that Johnson was mentioned in the October 15th conversation, constituted the basis of the trial examiner's opinion that the respondents engaged in a secondary boycott. This is reflected in the Intermediate Report: (R. 21)

> " . . . It appears clear to me that there is nothing here to overcome or balance all reasonable inferences to be drawn from Tacke's conversations with union business agents on October 15 and prior to that date in which they stated in effect that a sub-letting of the plumbing work to Johnson would not do because he was non-union, and Wright's statement on October 15, after learning some plumbing had actually been done by Johnson employees, that he was 'going to have to pull our boys off . . . ' "

This is the basic finding. It is subject to considerable question. It ignores many facts disclosed by the evidence which are at odds with it.

First, the conversation on October 15th between the business agents and Tacke, Thomas' superintendent,

was essentially taken up with a discussion of the night watchman problem and not with Johnson. (R. 55, 56, 65, 66, 70, 71) When and at what point, and for what *particular* reason, Wright stated that he'd have to "pull our boys"—all these questions are left to conjecture. The trial examiner, himself, has supplied the "evidence" to clarify this situation, however, by finding that it was made immediately and in response to Tacke's advice that Johnson was doing the plumbing. Note that the trial examiner supplies the word, "Thereupon", to his finding on this point. (R. 18) It is not in Tacke's testimony.

Second, it ignores the fact that nothing *new* relative to Johnson was told to the business agents by Tacke in the October 15th conversation. They had known for a *month* that Johnson had the subcontract to do the plumbing. (R. 48-50) On the other hand, the violation of the agreement regarding the night watchman first came to light in this October 15th meeting.

Third, the trial examiner seems to have over-looked the fact that the plumbers were not then on the job; that the plumbers returned to work the following Monday, the 19th, as per schedule and worked alongside the carpenter and laborers without any difficulty, (R. 141, 142) the same as they had on October 12th and 13th; that the plumbers returned to work again on October 26th and continued to work on the job without there ever being any trouble or question raised. (R. 113, 114, 128)

Fourth, the trial examiner ignored the fact that the business agents, without the plumbers' business agent being present, met with Thomas on the Monday following the work stoppage, at which time the business agents made no mention of Johnson or the plumbers,

referring only to their grievance concerning the failure of Thomas to pay union scale to the night watchman; that the only mention of Johnson made at that meeting was at the end thereof when *Thomas* brought up the subject, to which the business agents made no response. (102, 103, 120)

Fifth, the trial examiner ignored the fact that the night watchman was given an immediate raise, as of Monday, the 19th, to the extent of $44.00 per week, as a result of the Monday meeting in Flagstaff between Thomas and the business agents. (R. 76)

On the other hand, the trial examiner obviously gave considerable weight to the sheerest kind of hearsay involving discussions and conversations between persons outside the presence of respondents. Notwithstanding respondents' continuing objection to this sort of testimony, it is quite clear that the trial examiner relied on the *truth* of statements made by *Tacke* to certain plumbing employees to the effect that *Thomas* "had agreed to keep the plumbers off the job until things were settled." (R. 19, 61)

The trial examiner exhibited an interesting approach to "discrediting" witnesses. He implies that Thomas was testifying favorably to the union, and "trying to state nothing more injurious . . . than was required of him. . . ." (R. 20) The trial examiner then goes on in this context to give credence to the truth of hearsay statements made by *Thomas* to *Tacke* to the effect that Kropp had said to Thomas on Saturday morning, by telephone, that the carpenters would go back on the job "providing there were no plumbers on the job." (R. 20, 21, 58) Thus, hearsay was given the impact of truth even though Thomas in his testimony could not recall any such conversation with Kropp. (R. 102)

Where is the evidence, properly admitted, that substantiates the trial examiner's conclusion that an object of the strike was to force Thomas to cease doing business with Johnson? In this connection, it must be remembered that the "object" had to be an *immediate* or *direct* object, if it was to be labeled unlawful. *NLRB v. Bangor Building Trades Council,* (CA-1; 1960) 278 F. 2d 287.

The strike in this case was *primary* in nature, lawfully calculated to remedy the violation by Thomas of the bargaining agreement. Essentially all the evidence points to this. In such a stiuation, the "an object" test, *NLRB v. Denver Building and Construction Trades Council,* 341 U. S. 675, becomes too narrow. In *Local 618, Automotive, Petroleum, etc. Union v. NLRB,* (CA-8; 1957) 249 F. 2d 332, 33 Labor Cases No. 71,081, the court said:

> "We believe that . . . where lawful picketing in support of a valid primary strike is in progress against the primary employer at the employer's premises, the 'an object' test . . . is too narrow, and that there should be evidentiary support for a conclusion that the primary picketing serves no lawful purpose. . . ."

The trial examiner avoided making a clear finding on whether the respondents had a primary right involved. However, by implication, he suggests that this matter of the night watchman was but an *afterthought.* (R. 20) Yet, the evidence shows without dispute that Wright told Tacke *immediately before* the strike that Thomas was paying below scale. (R. 65)

It seems entirely reasonable that the respondents may have been happy to have a legitimate reason to strike Thomas, but that happiness is not enough to make

their primary strike into a secondary boycott. Assuming a "residual hope that a prohibited end" would be realized by striking Thomas, yet, this would not condemn the permissible objective of rectifying the contract violation regarding the wages of the night watchman. *Local 618 v. NLRB, supra; NLRB v. Local 50, Bakery and Confectionery Workers,* (CA-2; 1957) 245 F. 2d, 542, 32 Labor Cases No. 70,726.

Respondents respectfully submit that there is no substantial evidence supporting the decision of the trial examiner, nor the Board decision adopting it, insofar as it concludes that respondents engaged in a secondary boycott against Thomas with a direct or immediate object of forcing him to cease doing business with Johnson.

II.

The Amended Order is too broad in scope.

In its original Order, dated September 12, 1960, the Board ordered respondents to cease and desist from engaging in, or inducing or encouraging the employees of W. D. Don Thomas Construction Company, etc. where an object thereof was to force Thomas to cease doing business with Johnson. (R. 13) The General Counsel, on October 4, 1960, moved for reconsideration, urging a broader order. On March 10, 1961, the Board issued its Amended Order, broadening its order to include not only Thomas but "any other employer" "or person".

Assuming that respondents engaged in a secondary boycott, this Amended Order is too broad in scope and is not supported by substantial evidence in view of the record as a whole, and in view of the evidence as specifically found by the Board.

One of the respondents had had some contract difficulty with Johnson in past years, when he was a union contractor, but in each instance the conduct was lawful. No dispute about this. Johnson had finally ceased to be signatory to a labor agreement in 1957. (R. 129-131, 135) Since then he had subcontracted without trouble on numerous jobs where union people worked. (R. 133, 134)

There were no findings made by the trial examiner or Board regarding this matter.

The authority conferred upon the Board is to restrain the unlawful practice which it has found to have been committed. It does not have authority, however, to restrain generally all other unlawful practices which might occur, and which are not found to be persuasively related to the proven unlawful conduct. *Communications Workers of America, AFL-CIO and Local 4372 v. National Labor Relations Board,* 362 U. S. 479, 40 Labor Cases No. 66,461; *National Labor Relations Board v. International Longshoremen's Union, Local 10,* (CA-9; 1960) 283 F. 2d 558, 41 Labor Cases No. 16,591; *National Labor Relations Board v. Local Union 751, United Brotherhood of Carpenters,* (CA-9; 1960) 285 F. 2d 633, 41 Labor Cases No. 16,716; *National Labor Relations Board v. Ochoa Fertilizer Corporation,* (CA-1; 1960) 283 F. 2d 26, 41 Labor Cases No. 16,587; and *United Steelworkers of America v. National Labor Relations Board,* (CA-D. C.; 1961) 294 F. 2d 256, 42 Labor Cases No. 16,929.

In *National Labor Relations Board v. International Longshoremen's Union, Local 10,* supra, this Circuit Court made the following observation:

> "The Board cannot restrain practices which it has neither found to be pursued nor to be related to proven unlawful conduct. *Communications Workers,* . . . . See also *Morrison-Knudsen Co. v. NLRB,* 276 F. 2d 63, 76, 39 Labor Cases No. 66,308 (Ninth Circuit, 1960). A broad order will be modified unless the evidence supports a *proclivity* for unlawful action or unless a finding relating to the *likelihood of similar violations is made.* . . ." (Emphasis Added)

In the instant case the evidence does not show a proclivity for unlawful action on the part of these respondents, nor does it show a likelihood of similar violation against other employers.

Petitioner has attempted to distinguish the instant case from the rule laid down in *Communications Workers* and would have this Court follow an earlier Supreme Court decision, *International Brotherhood of Electrical Workers v. National Labor Relations Board,* 341 U. S. 694. Respondents are uninformed whether a similar argument has been made to this Court before. However, the report of the *Ochoa* Case shows that *International Brotherhood of Electrical Workers* was there considered. Nonetheless, Ochoa relied upon the more recent *Communications Workers:*

> ". . . where the Court held virtually without discussion, that because there was no evidence of a 'generalized scheme' a union's interference with the employees of one particular employer could not justify a decree against activity with relation to the employees 'of any other employer'. . . ."

The respondents respectfully submit that the Amended Order is unwarranted and that it should be modified by omitting from Paragraph 1 thereof (R. 31)

the following phrases: "or other employer" and "or any other employer or person."

CONCLUSION

Respondents respectfully urge that the Board's Decision and Supplemental Decision are not supported by substantial evidence. Further Respondents urge that the Amended Order, even if Respondents did commit an unfair labor practice, is too broad in scope.

Respectfully submitted,

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December 29, 1961